witness — which is the object of section 124 of the Criminal Procedure Code — the record showed a material part was underlined for that court president but we are all in the dark what it was — the accused did not recant upon his statement and said: "I agree I made a statement to a police officer. I did not mention 'scooter tyre'. I only mentioned 'tyre'. I now say I saw him carrying something which looks like a tyre." If this was stated in evidence, how then could the learned president make the statement I have underlined earlier? How is the appellant to know what case to meet upon the charge as drafted? In regard to his evidence at the trial, a number of statements had now been linked together and set out as contradicting his statement to the investigation officer. I am unable to distinguish and sort out the offending contradiction. I am unable to understand the basis for this charge as there has been no material contradiction in his evidence at the trial and his statement in the course of investigation particularly as he had corrected himself after being impeached. It would be directly contrary if he were to say at the trial "The accused did not carry anything out of the shop that night" or "It was not the accused but some other person whom I cannot recognise who took a tyre from the shop". I would like to quote a passage from the judgment of Buhagiar J. in *Haji Yusof bin Keromo* v. *Public Prosecutor* [1] (at p. 243) where he says:—

"Where a witness after having made a false statement, is cautioned by the trial judge and is informed of various circumstances which seem to establish the falsehood of that statement, and the witness after such caution acknowledges that his earlier statement was false and corrects it, it is not desirable to subject such witness to a prosecution for perjury."

Here short of identifying the article as a tyre to start with, I think his later statement that it looked like a tyre should have made it clear that a prosecution for false evidence is not maintainable. I find nothing on record for the view the learned president took "that accused was given a lot of chances to refresh his memory" or that he "was asked to speak the truth by the prosecuting officer".

It is clear that the learned president had taken extraneous matters into consideration and had failed to confine the issues to the charge preferred against the accused. I am unable to find any material discrepancy which had affected the result of the trial of Tan Eng Kiat which alone would, in my view, justify a prosecution of the appellant.

I accordingly quash the conviction and the sentence.

I would add that under section 123(4) of the Criminal Procedure Code (Cap. 21) "a police officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3)". This has not been done but in view of the decision I have come to on other grounds, I do not say whether such omission is fatal to a prosecution in respect of a statement purported to be recorded under the section.

Appeal allowed.

Conviction and sentence quashed.

Solicitors: *Lim, Lim & Oon.*

RAMLY & ORS. v. JAFFAR

[F.C. (Azmi C.J. (Malaya) Ismail Khan and MacIntyre JJ.) December 15, 1967]

[Kuala Trengganu — Federal Court Civil Appeal No. X. 82 of 1966]

Tort — Wrongful arrest — Claim for damages for wrongful arrest — Reasonable and probable cause — Test to be applied — Criminal Procedure Code (Cap. 6), s. 23 (i)(a).

The appellants appealed against the decision of the High Court which had awarded damages for wrongful arrest. The respondent had been arrested on a statement by one Zakaria and the learned judge had held that the statement made by Zakaria to the police was neither a credible information nor did it give rise to a reasonable suspicion as against the respondent within the meaning of section 23(i)(a) of the Criminal Procedure Code.

Held: the question whether there was a reasonable and probable cause must be determined objectively on the evidence before the court and in this case there was reasonable suspicion that the respondent was concerned in a seizable offence and therefore the arrest was not wrongful and the appeal must be allowed.

Case referred to:—

(1) *Tims* v. *John Lewis & Co.* [1951] 2 K.B. 472.

FEDERAL COURT.

Au Ah Wah for the appellants.

Ong Seng See and *Wong Kim Fatt* for the respondent.

Azmi C.J. (Malaya): This is an appeal by two police constables, hereinafter referred to by their names Ramly and Zain and their employer the Government of Malaysia, against an award of damages for the wrongful arrest of the respondent.

The claim was originally for wrongful arrest against Ramly and for procuring or assisting in the wrongful detention of the respondent against Zain and another police constable Latiff, and against all three for assault. The learned judge dismissed both claims against Latiff and the claim for assault against all three.

The claim for assault was dismissed by the judge in the following terms:—

"In the light of the medical evidence I had no difficulty in deciding that he (i.e. respondent) had not dis-

charged that burden. Indeed, his bare faced lie about the origin of the ear injury, and the patent attempt to manufacture evidence, in the shape of the recent scratch on his chest would brand him as a most unreliable person. I therefore find against the plaintiff on the issue of assault."

The learned judge also found as a fact that corporal Jalal informed the respondent the reason for his arrest immediately after arrest.

After coming to the conclusion that the respondent had been arrested by both corporal Jalal (incidentally not a defendant in this suit) and Ramly, the learned judge then went on to say that the burden of proving reasonable and probable cause lay on the defendants.

I pause here to point out that by the word "defendants" the learned judge must have included the other appellant police constable Zain. The allegations in the statement of claim against Zain and Latiff were mainly assault and secondly procuring and assisting in the detention of the respondent at the Meranti police station. The learned judge dismissed the case against Latiff in the following words:—

"On the balance of probabilities the second defendant (i.e. P.C. Latiff) was, at all material times, outside the police station, and had no part whatsoever in the act of false imprisonment."

Though as I have stated previously the learned judge must have found against Zain on the question of wrongful arrest, nowhere did the learned judge refer in his grounds of judgment to the part played by Zain for the wrongful arrest or detention of the respondent. On the other hand, Zain, in his evidence stated that he was on duty at the Meranti police station when corporal Jalal brought in the respondent and four other persons and he made an entry to that effect in the police station diary exhibit D.7, and that later corporal Jalal left the police station with the respondent and the four others for Pasir Mas. Zain also denied assaulting the respondent. The record would appear to show that at the end of the evidence in chief of Zain, the learned judge stood down this witness whilst waiting for the translation of Exh. D.7, and apparently Zain was never recalled for cross-examination.

The respondent himself in his evidence did not mention any part taken by Zain in reference to his arrest or subsequent detention. In the circumstances I would have thought that the case against Zain for wrongful arrest has not been proved. I would therefore allow the appeal by him.

Now to refer to the learned judge's judgment in reference to Ramly. After stating that the arrest of the respondent by corporal Jalal and Ramly as proved, the learned judge then went on to say that the burden had therefore shifted on the appellant to show reasonable and probable cause.

First he referred to section 23(i)(a) of the Criminal Procedure Code (Cap. 6) which reads as follows:—

"Any police officer or penghulu may without an order from a magistrate and without a warrant arrest —

(a) any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;"

Before I go into this question I first wish to refer to some relevant facts leading to the arrest of respondent. The matter actually started with a report marked Exh. D.6 made on 11th September 1965 by an officer of the government department of Irrigation and Drainage to the effect that a part of the irrigation bund in Kampong Perol had been damaged by some person or persons unknown. Acting on information received, corporal Jalal as the officer in charge of the police station detained Zakaria P.W.2 at about 4 p.m. on 17th September 1965. Zakaria as a result of prolonged interrogation gave information to the effect that he and the respondent were responsible for the digging up of part of the bund in question. The statement taken by corporal Jalal from Zakaria Exh. D.9 was put in as evidence and it is stated on the statement that it was taken at 8 p.m.

In considering the question of whether there was reasonable or probable cause the learned judge dealt on the evidence of corporal Jalal who gave evidence on behalf of the appellants.

Corporal Jalal in his evidence stated that he went to the respondent's house as a result of information given by Zakaria as recorded in Exh. D.9. The learned judge pointed out that the arrest made by corporal Jalal was not as a result of the report Exh. D.6. That of course would be plain enough. He then referred to the evidence of Zakaria where he admitted that at about 11 p.m. on the night of 10th September, the respondent and he dug up part of the canal embankment to release the water from the canal into a "bendang", (pady field).

The learned judge then went on to say that he could not regard Zakaria's statement to corporal Jalal as a complaint within the meaning of section 23 of the Criminal Procedure Code because that statement was made in the course of police investigations.

He then posed to himself the following questions:—

"Had credible information been received, or did a reasonable suspicion exist of the plaintiff having been concerned in this seizable offence? In short, did D.6 and the alleged information given by Zakaria P.W.2 amount to 'credible information' or give rise to 'reasonable suspicion' against plaintiff?"

In deciding these questions the judge had applied what he called the objective test as explained by

Lord Goddard in *Tims* v. *John Lewis & Co.*[1] Lord Goddard said this:—

"The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively as has been suggested. It is a question which objectively the court has to decide on the evidence before it."

The learned judge found that the statement made by Zakaria to corporal Jalal as neither a credible information nor did it give rise to reasonable suspicion as against the respondent within the meaning of the words in section 23(i)(a) of the Criminal Procedure Code.

It would appear that that finding of fact was based on the assumption that Zakaria broke down in the course of a prolonged interrogation and implicated the respondent. He came to the conclusion that the interrogation lasted 3 hours that is from 6.30 p.m. to 9.30 p.m. because (a) the corporal Jalal, admitted that he started questioning Zakaria at 6.30 p.m. after which he went to arrest the respondent and (b) that the time he left the police station was recorded in the station diary (not exhibited) as 9.30 p.m. The learned judge has discredited the corporal's evidence that he interrogated Zakaria between 6.30 p.m. and 7.30 p.m. because the statement, Exh. D.9 of Zakaria shows that it was recorded at 8 p.m.

In view of the fact that the corporal was giving evidence of an incident which happened a year previously I think the discrepancy as to time should not have been taken seriously. Even if the record was correct the interrogation must have been completed before the corporal started to type the statement at 8 p.m. In this case the corporal was not merely taking down a police report but a statement of Zakaria in the course of investigation and he would have to question the witness and ascertain all the facts before starting to record it. In any event the evidence shows that the corporal left the police station three hours after he started to question Zakaria but not that he questioned him for three hours. There is evidence to the effect that the corporal was waiting for the return of the police Land Rover and that fact might account for his leaving the police station three hours after 6.30 p.m.

Assuming that Zakaria had been questioned for three hours, and had as a result broken down and confessed implicating the respondent as well, the question is not whether the means employed to extract the information is right or wrong but whether his suspicion was reasonable judging from the facts he had before him. The judge has found that the means employed was persuasion which is a most commendable way of obtaining information. It is not suggested that the corporal persuaded Zakaria to implicate respondent but only that he persuaded him to tell the truth. If the corporal had persuaded Zakaria to implicate the respondent then he must have had information from somewhere else that the respondent was involved, in which case, he need not have persuaded Zakaria to implicate him for the purpose.

In my view, there was a reasonable suspicion that the respondent was concerned in a seizable offence, and therefore the appeal should be allowed and the judgment of the learned judge set aside. The respondent will pay the costs here and in the court below.

Ismail Khan J. concurred.

MacIntyre J.: I have had the advantage of reading the judgment of the learned Chief Justice in the abovenamed appeal, and I am in entire agreement with it.

Appeal allowed.

MOTILAL v. GUTHRIE AGENCY (M) LTD.

[O.C.J. (Gill J.) December 19, 1967]
[K.L. — Civil Suit No. 1151 of 1964]

Master and Servant — Summary dismissal — Justification of.

The plaintiff sued for damages for his dismissal without notice by the defendants by whom he was employed as chief clerk on a rubber estate at Labis. The substantial issue in this case was whether the defendants were justified in summarily dismissing the plaintiff from his service.

The defendants in their defence alleged the following acts of misconduct by the plaintiff: (a) failing to maintain a proper record of telephone calls made on the account of Bertam Estate as at April 1, 1964; (b) attempting to persuade one Simon to destroy the record of telephone calls which he (Simon) maintained with effect from the 1st day of April 1964 as instructed by the manager of Bertam Estate; (c) failing to draw the attention of the acting manager of Bertam Estate to the fact that the shopkeeper on Bertam Estate — Durian Tunggal Division — had failed to pay the shop rent for the months of June and July 1961; (d) directing the shopkeeper aforesaid to credit his personal account with the sum of $150 which represented the shop rent for the months of June and July 1961, taking advantage of such credit and failing to reimburse the estate with that amount; (e) failing to draw the attention of the manager of Bertam Estate to the fact that the shopkeeper aforesaid did not pay the rent for the month of October 1962; (f) directing the shopkeeper aforesaid to credit his personal account with the sum of $50 which represented the shop rent for the month of October 1962, taking advantage of such credit and failing to reimburse the estate with that amount; (g) removing from Bertam Estate and being in possession of a copy of a document intituled "Special Report by R.P.S. Clay" which was at all material times the property of the said estate.

The plaintiff denied each of the alleged acts of misconduct.

Held: (1) allegations (a), (b), (c) and (e) by themselves did not constitute sufficient ground for summary dismissal;

(2) on the facts the defendants have proved allegations (d) and (f) beyond reasonable doubt, therefore the defendants were justified in summarily dismissing the plaintiff;

(3) the report in allegation (g) came to the estate while the plaintiff was still its chief clerk. He did not